SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 861.

THE UNITED STATES, APPELLANT,

vs.

THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE AND THE CITY OF LOUISVILLE.

APPEAL FROM THE COURT OF CLAIMS.

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1. In the Court of Claims, Term 1895–1896.

THE COMMISSIONERS OF THE SINKING FUND OF the City of Louisville and the City of Louisville, Kentucky,
vs.
THE UNITED STATES.
18315.

I.—*Petition.*—*Filed March 14, 1894.*

To the Honorable the Judges of said Court:

Your petitioners say that they are both corporations organized and existing under the laws of the State of Kentucky and that they have power to sue and be sued, and they respectfully represent:

1. That said city of Louisville during the period from October 1, 1862, to July 6, 1872, was the owner and holder of a large amount of the stock and bonds of the Louisville and Nashville Railroad Company; that during said period of time there accrued to said city dividends upon the stock of said railroad company and also a large amount of interest upon the bonds and securities of said railroad company so owned and held by said city of Louisville. And said city being the owner of the stock and bonds of said company and also its proportionate share of the surplus earnings of said company, was entitled to the full use, profit, and advantage of the same and all the interest accruing thereon, without any deduction or diminution thereof.

2 2. Said dividends, interest, and moneys so accruing and belonging to the said city of Louisville were not the proper subjects of taxation under the internal-revenue laws of the United States.

3. Yet notwithstanding such immunity from taxation, the United States by its officers and agents, between the first day of October, 1862, and the fifth day of July, 1872, under the act of June 30, 1864, and other internal-revenue laws, made an assessment upon the aforesaid dividends, interest, and money, belonging to said city of Louisville at the rate of three per cent upon some portions, five per cent upon other portions, and two and one-half per cent upon other portions thereof, and the said assessment was collected and the amount thereof deducted and withheld from the dividends, interest, and moneys due and payable to the city and its board of sinking fund commissioners, and the revenues of the city were lessened to that extent.

4. Said internal-revenue taxes so illegally assessed and collected amounted to the sum of thirty-four thousand six hundred and sixty-seven dollars and eighty cents ($34,667.80).

5. On the twenty-fifth day of February, 1893, the Congress of the United States passed an act entitled "an Act for the benefit of the State of Kentucky, Logan and Simpson counties, and of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee," by which it was provided that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, was authorized and required to audit and adjust the claims of the sinking fund commissioners of the State of Kentucky, of Logan and Simpson counties in said State, of the city of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee, for

internal-revenue taxes collected on railroad dividends, on stock, and on interest on railroad bonds owned by said counties and city, respectively, in the Louisville and Nashville Railroad Company, and of said State, for internal-revenue taxes collected, and interest on railroad bonds of the railroad from Louisville to Lexington, on dividends on stock of said
3 railroads owned by said State, counties, and city, to the extent that such taxes were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded, and for this purpose any statute of limitations to the contrary notwithstanding, sections 989, 3220, 3226, 3227, and 3228 of the United States Revised Statutes are made applicable and available with the force and effect as if protest and demand for payment had been made within the time prescribed by said sections; and the amounts when ascertained, as aforesaid, and not heretofore refunded, shall be paid out of the permanent annual appropriations provided for similar claims allowed within the present fiscal year. A copy of said statute is hereto appended.

6. Afterwards, to wit, on the day of May, 1893, your petitioners appealed to the Commissioner of Internal Revenue for a refunding of said sum of $34,667.80, the amount of the tax so as aforesaid illegally assessed and collected, and the said Commissioner upon full consideration decided and held that said taxes were illegally assessed and collected, and that there should be refunded to the petitioners the sum of thirty-one thousand three hundred and fifty-nine dollars and two cents ($31,359.02), and thereupon, upon the 26th day of September, 1893, the Hon. Geo. W. Wilson, Acting Commissioner of Internal Revenue, addressed a letter to the Secretary of the Treasury setting forth his decision and recommending that said sum of $31,359.02 be refunded. On the 6th day of October, 1893, Hon. C. S. Hamlin, Acting Secretary of the Treasury, having carefully examined and considered the subject, approved the action and recommendation of the Commissioner of Internal Revenue.

On the 7th day of October, 1893, the Acting Commissioner of Internal Revenue ordered said money to be refunded to the petitioners, and issued his certificate and schedule No. 1403 properly signed, allowing said claim for the sum of $31,359.02, all of which will more fully appear by
4 reference to said certificate and schedule, a copy of which is hereto appended and make part of this petition.

Copies of the letters of the Acting Commissioner of Internal Revenue and the Acting Secretary of the Treasury hereinbefore referred to are also appended to this petition.

8. No assignment or transfer of said claims or any part thereof or interest therein has been made, and the said city of Louisville and your petitioners, the sinking fund commissioners of said city, representing said city, are the owners, and entitled to the full amount of said sum of thirty-one thousand three hundred and fifty-nine dollars and two cents ($31,359.02) from the United States, after allowing all just credits and offsets.

Your petitioners have demanded that the amount so certified and allowed be paid in due course of office; but there has been paid only the sum of thirteen thousand seven hundred and twenty-five dollars and fifty-nine cents ($13,725.59), and all other or further payments have been refused. There is still due on the amount allowed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury the sum of sev-

enteen thousand six hundred and thirty-three dollars and forty-three cents ($17,633.43), for which payment has been refused, though often requested. Petitioners therefore demand judgment against the United States for said sum of seventeen thousand six hundred and thirty-three dollars and forty-three cents.

FONTAINE T. FOX,
Att'y for Board of Sinking Fund Commissioners of the City of Louisville, Ky., and the City of Louisville.

THE STATE OF KENTUCKY, *City of Louisville:*

Chas. H. Gibson, president of the board of the sinking fund commissioners of the city of Louisville and State of Kentucky, being duly sworn, on oath says that no assignment or transfer of the claim mentioned and set forth in the foregoing petition or any part thereof or any interest therein has been made; that the petitioners are justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets, and he believes the facts stated in said petition are true.

CHAS. H. GIBSON,
President of the Board of Sinking Fund Com'rs of the City of Louisville.

Subscribed and sworn to before me this 5th day of March, A. D. 1894.

[SEAL.] GEORGE R. LOCHER,
Notary Public, Jefferson County, Kentucky.

Commission expires January 11, 1896.

E. H. B. [Copy.] C. H. I.

[Enclosure.]

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., September 26, 1893.

Hon. J. G. CARLISLE, *Secretary of the Treasury.*

SIR: I have the honor to transmit herewith for your consideration, advisement, and approval the claim of the sinking fund commissioners of the city of Louisville, Kentucky, for the refunding of thirty-four thousand six hundred and sixty-seven dollars and eighty cents ($34,667.80), tax alleged to be due and payable to the said city under the provisions of the act of Congress (Public, No. 91) approved February 25, 1893, entitled "An act for the benefit of the State of Kentucky, Logan and Simpson counties, and of Louisville, Kentucky," etc.

Among other things, the act directs the refunding to the city of Louisville of "internal revenue taxes collected on railroad dividends on stock and on interest on railroad bonds owned by said * * * city * * * in the Louisville and Nashville Railroad Company * * * to the extent that such taxes were deducted from any dividends or interest due and payable * * * and which have not been heretofore refunded."

The tax claimed was collected on the surplus afterwards converted into dividends on stocks and on interest on bonds of the Louisville and Nash-

ville Railroad Company held by the city of Louisville between October 1, 1862, and July 5, 1872. The total amount so withheld from said city on account of tax on the coupons of said bonds is found to be thirty-one thousand six hundred and fifty-nine dollars and forty cents ($31,659.40), and the total share of taxes on dividends and surplus borne by the city is found to be forty-two thousand two hundred and thirteen dollars and fifty-seven cents ($42,213.57), making an aggregate of seventy-three thousand eight hundred and seventy-two dollars and ninety-seven cents ($73,872.97). Of this aggregate the sum of forty-two thousand five hundred and thirteen dollars and ninety-five cents ($42,513.95) has been refunded (see Fifth Auditor's Report, No. 58114), which leaves
6 thirty-one thousand three hundred and fifty-nine dollars and two cents ($31,359.02) to be refunded. I propose to allow the claim for this amount.

Respectfully, yours,
(Signed) G. W. WILSON,
Acting Commissioner.

9482A.
28-EK.

[Copy.]

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., October 6, 1893.

COMMISSIONER INTERNAL REVENUE.

SIR: With your letter of the 26th ultimo, you submitted "for the consideration, advisement, and approval" of the Secretary, the claim of the sinking fund commissioners of the city of Louisville, Kentucky, for the refunding, under section 3220, R. S., of $34,667.80, tax alleged to be due and payable to the said city under the provisions of the act of February 25, 1893 (27 Stat., 477), for the benefit of the State of Kentucky, * * * Louisville, &c., directing, among other things, the refunding to the city of Louisville of "internal-revenue taxes collected on railroad dividends on stock and on interest on railroad bonds owned by said * * * city * * * in the Louisville and Nashville Railroad Company, * * * to the extent that such taxes were deducted from any dividends or interest due and payable * * * and which have not been heretofore refunded."

You find that the sum of thirty-one thousand three hundred and fifty-nine dollars and two cents ($31,359.02) was withheld by said Louisville and Nashville Railroad Company on interest on bonds of said company, owned by the city of Louisville, between October 1, 1862, and July 5, 1872, and paid to the United States under the provisions of section 122 of the act of June 30, 1864, and you propose to allow said amount ($31,359.02).

Your allowance is hereby approved and the claim is herewith returned.

Respectfully, yours,
(Signed) C. S. HAMLIN,
Acting Secretary.

L. J. C.

E. H. B. No. 1403. R. T. H.

A schedule of claims for the refunding of taxes which have been examined and allowed.

Dist.	Claimants.	Amount.
5th Ky.	Sinking fund commissioners of the city of Louisville, Kentucky	$31,359.02
	Sinking fund commissioners of Logan County, Kentucky	15,397.75
	Sinking fund commissioners of Simpson County, Kentucky	1,296.02
	Total	$48,052.79

I hereby certify that the foregoing claims for refunding of taxes erroneously assessed and paid have been examined and allowed.

G. W. WILSON,
Acting Commissioner of Internal Revenue.

OFFICE OF INTERNAL REVENUE,
October 7, 1893.

7 II.—*Amendment to petition filed by leave of court March 28, 1895.*

To the Honorable the Judges of said Court:

Your petitioners, by leave of the court first had and obtained, file this their amendment to their original petition:

At the end of said petition add the following additional count or paragraph:

Your petitioners further say, and making reference to the statements contained in the first count of their petition, that in their application to the Commissioner of Internal Revenue for the refunding of the sum of $31,359.02 they made demand for interest upon the amount so illegally collected from them, which said claim for interest was disallowed, and they aver that there is justly due and owing to them interest upon the aforesaid sum of thirty-one thousand three hundred and fifty-nine and $\frac{2}{100}$ dollars, at the rate of six per cent per annum, from the 6th day of July, 1872.

No assignment or transfer of said claim or any part thereof, or any intent therein has been made, and the said commissioners of the sinking fund of the city of Louisville and the city of Louisville are the owners, and entitled to the full amount of said claim for interest, and they therefore demand judgment for the amount of said interest from the date last aforesaid to March 1st, 1894, on $31,359.02, and on $17,633.43 since that time.

FONTAINE T. FOX,
Attorney for Claimants.

THE STATE OF KENTUCKY,
City of Louisville.

Chas. H. Gibson, president of the board of sinking fund commissioners of the city of Louisville and State of Kentucky, being duly sworn, on oath says that no assignment or transfer of the claim mentioned and set forth in the foregoing amendment to the petition in this case, or any part thereof, or any interest therein, have been made; that the petitioners are

justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets, and he believes the facts stated in the foregoing amendment to the petition are true.

CHAS. H. GIBSON.

Sworn to and subscribed before me this 25th March, 1895.

[SEAL.] WILLIAM T. HALL,
Notary Public, Jefferson County, Kentucky.

Commission expires January 11, 1896.

8 III.—*Traverse.—Filed November 12, 1895.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney-General.

9 IV.—*Findings of fact and conclusion of law.—Filed December 2, 1895.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

Between October 1, 1862, and July 6, 1872, the city of Louisville, Ky., owned a large amount of the stock and bonds of the Louisville and Nashville Railroad Company. The company paid the interest on its bonds and cash dividends on its stock from time to time, retaining, however, in each of the years 1865 to 1871, inclusive, an undistributed surplus. Under the internal-revenue laws in force during that period the said company paid taxes to the United States upon its gross receipts, its undistributed surplus, the interest payable on its bonds, and its cash dividends. The taxes paid on interest and dividends were deducted from the amounts due as interest and dividends, so that the revenues of the city of Louisville accruing from these sources were diminished to the extent of such deduction, but such deduction was not known to the sinking fund commissioners of the city until the time had expired for an application for a refund of the taxes so deducted.

II.

On November 16, 1867, the directors of the said company resolved to make an increase of its capital stock to the extent of 40 per cent, the same to be distributed among the owners of stock in proportion to the amounts

owned by them on a certain date, by certificates of stock to be issued therefor after February 10, 1868. The city of Louisville received in 1868 certificates for its due proportion of the said increase of stock.

On October 6, 1880, the directors of the said company resolved to increase its capital stock 100 per cent, such increase to be distributed among the owners of stock and stock liabilities in proportion to the amount owned by them on a certain date, by certificates of paid-up stock to be issued after December 1, 1880. The city of Louisville, having continued to hold the stock of the said company, received in 1881 certificates for its due proportion of the said increase of stock.

10

III.

On March 10, 1890, the board of the commissioners of the sinking fund of Louisville, Ky., presented a petition to the Committee on Claims of the House of Representatives, stating that the city of Louisville had owned stock in the Louisville and Nashville Railroad Company; that dividends had been declared from time to time on the said stock, which dividends had become due and payable to the said board, and that taxes had been levied upon such dividends as stated in Finding I. The petition asked favorable consideration of a bill which had been introduced to require a refund of these taxes, but made no mention of any other taxes than such as had been levied upon "dividends due and made payable" only.

IV.

Under the act of June 16, 1890 (26 Stat. L., 157), the city of Louisville and the sinking fund commissioners of the said city applied for a refund of $65,578.32 on account of taxes claimed to have been illegally exacted of the said city through the Louisville and Nashville Railroad, which amount was stated, in a schedule annexed to the claim, as being composed of the following items:

1. Dividends (distributed)	$24,801.14
2. Dividends (undistributed or surplus)	21,721.29
3. Interest on bonds owned by city	815.30
4. Gross receipts	18,240.59
Total tax due	65,578.32

Evidence was presented of the 40 per cent increase in the stock of the railroad company in 1867–68, mentioned in the second finding, but it does not appear that any evidence as to the 100 per cent increase of stock in 1880 was presented at that time.

V.

This claim was duly audited and adjusted by the Commissioner of Internal Revenue, who allowed $24,801.14 on account of taxes paid by the Louisville and Nashville Railroad Company on dividends paid to the city of Louisville, and $17,712.89 on account of taxes paid in 1865, 1866, and 1867 by the said railroad company on its undistributed surplus, the said sum of $17,712.89 being proportioned to the amount of stock issued to the city of Louisville out of the 40 per cent stock dividend above men-

tioned. He refused to allow the claim on account of taxes paid on gross receipts and on interest and so much of the claim on account of taxes on undistributed surplus as concerned the taxes levied in 1868, 1869, 1870, and 1871. The action of the Commissioner was approved by the Secretary of the Treasury, and when the claim reached the First Comptroller, through the Fifth Auditor, the correctness of the finding was not questioned, but the Comptroller reported that there was no appropriation out of which payment could be made.

11 The following papers show more specifically the action of the Commissioner, Auditor, and Comptroller:

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
Washington, D. C., January 24, 1891.

Hon. WILLIAM WINDOM,
Secretary of the Treasury.

SIR: I have the honor to submit herewith, for your consideration and advisement, the claim of the sinking fund commissioners of the city of Louisville, in the State of Kentucky, for the refunding of taxes collected from the Louisville and Nashville Railroad Company to the amount of $65,578.32.

The taxes were collected prior to 1873, and the claim was filed in September, 1890.

The claim is therefore barred except so far as the act of June 16, 1890 (Public, No. 157), authorizes the adjustment of it. That act directs the adjustment of this claim "to the extent that such taxes were deducted from any dividends due and payable," and does not direct the adjustment of the claim to the extent that taxes were deducted from interest or gross receipts.

I have, therefore, only to consider the amount deducted from dividends accruing to the city of Louisville by virtue of its shares of stock in the railroad company.

The tax on dividends was paid by the railroad company under the provisions of section 122 of the act of June 30, 1864.

So far as this tax was deducted from dividends accruing to the city of Louisville, it was unlawfully deducted and paid over to the United States. (See decision of the U. S. Supreme Court in the case of United States v. Railroad Company, 17 Wall., 322.)

The amount so deducted from the share of dividends to which the city of Louisville was entitled is found to be $42,514.03, which embraces the sum of $24,801.14 collected on cash dividends and $17,712.89 collected as tax on surplus profits, which were afterwards set apart by resolution of the board of directors of the railroad company as the basis of a stock dividend which was declared in 1868.

I propose to allow the claim for the sum of $42,514.03.

Respectfully, yours,

JOHN W. MASON, *Commissioner.*

TREASURY DEPARTMENT, FIFTH AUDITOR'S OFFICE,
February 3d, 1891.

I hereby certify that I have examined and adjusted an account between the United States and the Comm'r of Int. Rev. and find that the sum of

forty-two thousand five hundred thirteen $\frac{95}{100}$ dollars is due from the United States, as follows, viz:

For the refunding of taxes, deducted from dividends on shares of stock in the Louisville and Nashville Railroad Co. Schedule No. 1317. Private act app'd June 16, '90.

Payable to the board of the sinking fund commissioners of the city of Louisville, Ky.

Care of Comm'r Int. Rev., 5th district, Ky.

Pay out of the appropriation for the relief of the board of comm'rs of the sinking fund of the city of Louisville, Ky., app'd June 16, '90, as appears from account and vouchers herewith transmitted for decision of the First Comptroller of the Treasury thereon.

J. L. TUCKER,
Acting Auditor.

$42,513.95.

To the FIRST COMPTROLLER OF THE TREASURY.

TREASURY DEPARTMENT, FIRST COMPTROLLER'S OFFICE,
March 7, 1891.

I admit and certify that a balance of forty-two thousand five hundred fourteen and $\frac{03}{100}$ dollars is due and payable as stated in the above report. Pay out of the appropriation for "payment to city of Louisville, Ky." Deficiency act approved March 3, 1891.

A. C. MATTHEWS,
First Comptroller.
By I. R. GARRISON,
Deputy First Comptroller.

12 VI.

The two items allowed amounted to $42,514.03. This amount was reported to Congress by the Secretary of the Treasury February 14, 1891, as having been found due under the act of June 16, 1890, and as having remained unpaid for lack of an appropriation, but no statement of the items of the claim made or those composing the amount allowed appears to have been made to Congress. Subsequently the sum of $42,514.03, appropriated by the act of March 3, 1891 (26 Stat. L., 854, 857), was paid to the city of Louisville.

The following are the communications by which the refund of the Commissioner of Internal Revenue was transmitted to Congress:

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
Washington, D. C., February 14, 1891.

SIR: Referring to an act for the relief of the board of commissioners of the sinking fund of the city of Louisville, Ky., approved June 16, 1890 (25 Stat., p. 157), which directed the audit and adjustment of the claim of said board of commissioners for internal-revenue taxes, etc., I have the honor to inclose copy of a report made by the First Comptroller in the case, of this date, showing that the sum of $42,514.03 is found due the claimants.

As there is no appropriation available for the payment of the claim, the sum found due as shown by the Comptroller's letter is respectfully submitted for the action of Congress.

Respectfully, yours,

A. B. NETTLETON,
Acting Secretary.

The SPEAKER OF THE HOUSE OF REPRESENTATIVES.

TREASURY DEPARTMENT, FIRST COMPTROLLER'S OFFICE,
Washington, February 14, 1891.

SIR: The letter of Senator Blackburn, in regard to the claim of the sinking-fund commissioners of the city of Louisville, Ky., is respectfully returned with the remark that the act for the relief of the claimant was passed by the Fifty-first Congress at the first session, on the 16th of June, 1890. It directed the Secretary of the Treasury and the Commissioner of Internal Revenue to audit and adjust the claim, which they have done, finding the amount of $42,514.03 due the claimant, the correctness of which finding is not questioned by this office. In due course, on the 4th instant, this claim, so adjusted, reached this office for payment. The act requiring the audit and adjustment does not carry an appropriation for the payment of the amount to the claimant, nor can it be paid out of the permanent annual appropriation, under section 3689, Revised Statutes.

As the present Congress has had this matter under consideration, and referred it for adjustment, I see no impropriety in reporting it at once for an appropriation.

Very respectfully,

A. C. MATTHEWS,
Comptroller.

Hon. A. B. NETTLETON,
Acting Secretary of the Treasury.

VII.

Under the act of February 25, 1893 (27 Stat. L., 477), the city of Louisville and the sinking-fund commissioners applied for a refund of $34,667.80 on account of taxes claimed to have been illegally
13 exacted, which amount was stated in a schedule annexed to the claim as being composed of certain items described in the claim, as follows:

United States of America, Dr., to commissioners of the sinking fund of the city of Louisville and the city of Louisville.

To internal-revenue tax on undistributed dividends or surplus (which was afterwards, to wit, in April, 1881, reduced or converted into a scrip or stock dividend) collected as follows:

Oct. 31, 1868	$1,304.20
Nov. 30, 1869	529.15
Jan. 10, 1871	829.25
Nov. 10, 1871	345.80
Total amount	3,008.40

FINAL SUMMARY.

1. Am't collected on interest on bonds, supra	$31,659.40
2. Am't collected on surplus or undistributed dividends	3,008.40
Entire total	34,667.80

Evidence was presented of the 100 per cent increase in the stock of the railroad company in 1880, mentioned in the second finding. The claim for the amounts stated to have been collected from the railroad company on account of taxes levied upon its undistributed surplus in 1868 to 1871 (amounting to $3,008.40 in all) had been included in the claim presented in 1890, but, as stated in the fifth finding, had not been allowed.

VIII.

The Acting Commissioner of Internal Revenue audited and adjusted this claim, and as incidental to such audit and adjustment he reexamined the claim allowed in 1891. He allowed the entire claim on account of taxes on interest on bonds ($31,659.40), and also that on account of taxes on surplus, which he found to amount to $3,248.51, making a total gross allowance of $34,907.91. In consequence of the reexamination of the allowance of 1891, out of the sixteen items then allowed on account of taxes on dividends, eight were decreased, five were increased, and three were not changed, the aggregate result being a reduction of $221.34, or from $24,801.14 to $24,579.80. The allowance of 1891 on account of taxes on surplus was reduced by $3,327.55, or from $17,712.81 to $14,385.26, making a total reduction on both branches of the allowance of 1891 of $3,548.89, which being subtracted from $34,907.91 allowed left a net allowance of $31,359.02.

The Acting Commissioner reported to the Secretary of the Treasury as follows in regard to the claims of 1891 and 1893, treated as one:

"The total amount so withheld from said city [Louisville] on account of tax on the coupons of said bonds is found to be thirty-one thousand six hundred and fifty-nine dollars and forty cents ($31,659.40), and the total share of taxes on dividends and surplus borne by the city is found to be forty-two thousand two hundred and thirteen dollars and fifty-seven cents ($42,213.57), making an aggregate of seventy-three thousand eight hundred and seventy-two dollars and ninety-seven cents ($73,872.97). Of this aggregate the sum of forty-two thousand five hundred and thirteen dollars and ninety-five cents ($42,513.95) has been refunded (see Fifth Auditor's report No. 58114), which leaves thirty-one thousand three hundred and fifty-nine dollars and two cents ($31,359.02) to be refunded. I propose to allow the claim for this amount."

14

IX.

The balance so allowed, having been approved by the Acting Secretary, was certified by the Fifth Auditor to the First Comptroller, who deducted therefrom the sum of $17,633.85, leaving a balance of $13,725.17, for which sum he directed a draft to be issued to the city of Louisville. The amount so deducted ($17,633.85) was made up as follows:

Amount allowed and paid in 1891 for taxes on surplus	$17,712.89
Excess paid in 1891 for taxes on cash dividends	221.34
Total erroneous allowance paid in 1891	17,934.23
Net amount deducted by Commissioner (for errors in 1891) from allowance for taxes on interest	300.38
Balance of erroneous allowance to be deducted	17,633.85

And upon the foregoing findings of fact the court decides, as conclusion of law, the claimants should recover seventeen thousand six hundred and thirty-three dollars and forty-three cents ($17,633.43).

V.—*Opinion of the court.*

NOTT, J., delivered the opinion of the court:

A number of points were presented and ably argued on the hearing of this case, but in the opinion of the court it turns and must be decided upon only one of them.

The action is to recover an unpaid balance of a refund of internal-revenue taxes allowed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury. Such an allowance is an award, and upon it an action may be maintained in this court. (United States v. Kaufman, 96 U. S. R., 567, affirming decision in 11 C. Cls. R., 659.) Such an award is conclusive unless impeached, and the burden of impeaching it is upon the defendants. In this case they have not sought to do so.

The defense is in fact, though not in form, by way of set-off, and goes only to a portion of the demand. That is to say, the amount set up by way of set-off is less than the amount of the award.

The facts which present the point to be determined are practically embodied in two acts of Congress. In 1890 a statute was passed authorizing the Secretary of the Treasury and the Commissioner of Internal Revenue to adjust the claim of the city of Louisville for a refund of "taxes on dividends on shares of stock" which the city owned in the Louisville and Nashville Railroad. The Secretary and Commissioner made a refund in which they allowed the city $24,801.14 on account of taxes paid on cash dividends and $17,712.89 on account of taxes paid on "undistributed surplus," or profits of the road, the whole amounting to $42,514.03. Subsequently Congress, by the Deficiency Act, 30th of June, 1891 (26 Stat. L., pp. 862, 867), made the following appropriation:

"Payment to the city of Louisville, Kentucky: For payment to the city of Louisville, Kentucky, the amount found due, under act of Congress approved June sixteenth, eighteen hundred and ninety, and reported to Congress in House Executive Document numbered two hundred and sixty of the present session, forty-two thousand five hundred and fourteen dollars and three cents."

The defendants insist that the allowance by the Commissioner of Internal Revenue of the amount of $17,712.80 on account of taxes paid on stock dividends was erroneous and unauthorized by the act of 1890, and that the subsequent act 25th of February, 1893 (27 Stat. L., p. 477), has reopened the matter, so that the erroneous allowance of the Commissioner can be set off against the unquestioned award which is the subject of the suit.

This act of 1893, like the act of 1890, authorizes and requires the Commissioner of Internal Revenue to audit and adjust claims of the city of Louisville and of certain counties in Kentucky for internal-revenue taxes on dividends declared by the Louisville and Nashville Railroad Company.

It also directs that this shall be done notwithstanding "any statute of limitations to the contrary;" and it finally directs that "the amounts when ascertained, as aforesaid, and not heretofore refunded, shall be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year."

If Congress intended to make the remedy granted by this statute conditional upon the reexamination of the claim previously adjudicated and paid under the acts of 1890–1891, there should have been a provision signifying such an intent. If it had provided that the Secretary and Commissioner, or the accounting officers of the Treasury, might reexamine the award that had then been made and satisfied, and deduct any erroneous overpayment from any amount which might be allowed on the claims which might be allowed under the act of 1893, the claimant by seeking relief under the statute would be deemed to have agreed to the prescribed condition. But the statute as it stands expresses no intent to disturb what has been done, and no such intent can be read into it where there is no such implication. The question, therefore, is whether the refund of taxes, if made by the Commissioner of Internal Revenue in excess of his statutory authority, can be recovered back after it has been paid under and by the express authority of an act of Congress.

It is the opinion of the court that money paid to a designated person by authority of a specific appropriation of Congress can not be recovered back because of subsequently discovered mistake of fact or error of law. The Supreme Court said in United States v. Jordan (113 U. S. R., pp. 418, 422, and sec. 19, C. Cls. R., 108):

"The Court of Claims held that the statute did not admit of that interpretation, nor leave open any question for the court or for the accounting officers of the Treasury except the identity of the claimants with the persons named in it; and that its language, taken together, was too clear to admit of doubt that Congress undertook, as it had a right to do, to determine not only what particular citizens of Tennessee by name should have relief, but also the exact amount which should be paid to each one of them. We concur in this view."

The language is authoritative to this court and decisive of the present case. The judgment of the court is that the claimant recover the amount withheld by the accounting officers from the award made under the act of 1893, to wit, the sum of $17,633.43.

16 VI.—*Judgment of the court.*

At a Court of Claims held in the city of Washington on the second day of December, A. D. 1895, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find for the claimants, and do order, adjudge, and decree that the said The Commissioners of the Sinking Fund of the City of Louisville and The City of Louisville, Kentucky, do have and recover of and from the United States the sum of seventeen thousand six hundred and thirty-three dollars and forty-three cents ($17,633.43).

BY THE COURT.

17 VII.—*Application of defendants for and allowance of appeal.*

THE COMMISSIONERS OF THE SINKING FUND OF the City of Louisville and The City of Louisville, Kentucky,
v.
THE UNITED STATES. } No. 18315.

From the judgment rendered in the above-entitled cause, on the 2nd day of December, 1895, in favor of the claimants, the defendants, by their Attorney-General, on the 21st day of December, 1895, make application for and give notice of an appeal to the Supreme Court of the United States.

J. E. DODGE,
Asst. Atty. General.

Filed December 21, 1895.

Allowed in open court January 13, 1896.

WILLIAM A. RICHARDSON,
Chief Justice.

18 In the Court of Claims.

THE COMMISSIONERS OF THE SINKING FUND OF the City of Louisville and The City of Louisville, Kentucky,
vs.
THE UNITED STATES. } No. 18315.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application of the defendants for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 17th day of January, 1896.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Case No. 16151. Term No., 861. The United States, appellant vs. The Commissioners of the Sinking Fund of the City of Louisville and The City of Louisville. Court of Claims. Filed January 18, 1896.

(16,274.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 167.

THE COMMISSIONERS OF THE SINKING FUND OF LOGAN COUNTY AND THE COUNTY OF LOGAN, KENTUCKY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 22, 1897.

1 In the Court of Claims.

THE COMMISSIONERS OF SINKING FUND OF LOGAN COUNTY and THE COUNTY OF LOGAN, KENTUCKY,
vs.
THE UNITED STATES. } 18316.

I.—*Petition. Filed March* 14, 1894.

To the honorable the judges of said court:

Your petitioners state that they are both corporations organized and existing under and by virtue of the law of the State of Kentucky, and they respectfully represent:

1. That said County of Logan during the period from October 1, 1862, to July 6, 1872, was the owner and holder of a large amount of the stock of the Louisville and Nashville Railroad Company, upon which said stock dividends were declared, and moneys became payable to said county, and to its sinking fund commissioners. The said county was the owner of the dividends so declared, and of its share of the surplus earnings of the said railroad company, afterwards converted into stock certificates, and was entitled to the full use, profit, and advantage of the same without any diminution or deduction.

2. Said dividends, moneys, and stock certificates, so belonging to Logan county, were not the proper subject of taxation under the internal revenue laws of the United States.

3. Yet, notwithstanding such immunity from taxation, the
2 United States, by its officers and agents, between the first day of October, 1862, and the fifth day of July, 1872, under the act of June 30, 1864, and other internal revenue laws, made an assessment upon the aforesaid dividends, stock certificates, and moneys belonging and payable to said county and its commissioners, at the rate of three per cent. upon some portions, five per cent. upon other portions, and two and one-half per cent. upon other portions of said dividends, certificates, and moneys so belonging to said county, and the amount of the assessments so made was deducted from dividends and other moneys, payable to said county and to its sinking fund commissioners, so that the revenues of said county were lessened to that extent.

4. Said internal revenue taxes so illegally assessed and collected, amounted to the sum of seventeen thousand six hundred and six dollars and fourteen cents ($17,606.14).

5. On the 25th day of February, 1893, the Congress of the United States passed an act entitled "An act for the benefit of the State of Kentucky, Logan and Simpson counties, and of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee, by which it was provided that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, was authorized and required to audit and adjust the claims of the sinking fund com-

missioners of the State of Kentucky, of Logan and Simpson counties in said State, of the city of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee, for internal revenue taxes collected on railroad dividends, on stock, and on interest on railroad bonds owned by said counties and city, respectively, in the Louisville and Nashville Railroad Company, and of said State, for internal revenue taxes collected, and interest on railroad bonds of the railroad from Louisville to Lexington, on dividends on stock of said railroads owned by said State, counties and city, to the extent that such taxes were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded, and for this purpose, any statute of lim-
3 itation to the contrary notwithstanding, sections 989, 3220, 3226, 3227 and 3228 of the United States Revised Statutes are made applicable and available with the force and effect as if protest and demand for payment had been made within the time prescribed by said sections; and the amounts when ascertained, as aforesaid, and not heretofore refunded, shall be paid out of the permanent annual appropriations provided for similar claims allowed within the present fiscal year. A copy of said statute is hereby appended.

6. Afterward, to wit, on the — day of May, 1893, your petitioners appealed to the Commissioner of Internal Revenue for a refunding of said sum of seventeen thousand six hundred and six dollars and fourteen cents ($17,606.14), the amount of the taxes so as aforesaid illegally assessed and collected, and said Commissioner upon consideration, decided and held, that said taxes were illegally collected and ought to be refunded to the amount of fifteen thousand three hundred and ninety-seven dollars and seventy-five cents ($15,397.75), and thereupon on the 28th day of September, 1893, Hon. Geo. W. Wilson, acting Commissioner of Internal Revenue, addressed a letter to the honorable Secretary of the Treasury, setting forth his decision, and recommended to the Secretary that said sum of fifteen thousand three hundred and ninety-seven dollars and seventy-five cents be refunded.

On the 6th day of October, 1893, the Hon. C. S. Hamlin, acting Secretary of the Treasury, having examined and considered the action of the Commissioner of Internal Revenue, aforesaid, then and there approved of the same.

7. On the 7th day of October, 1893, Geo. W. Wilson, acting Commissioner of Internal Revenue, ordered said sum of fifteen thousand three hundred and ninety-seven dollars and seventy-five cents to be refunded to the petitioners and issued his certificate and schedule, properly signed, allowing said claim, all of which will more fully appear by reference to said certificate, and Schedule No. 1403, which is hereto appended, and made part of this petition.

4 Copies of the letters of the acting Commissioner of Internal Revenue and the acting Secretary of the Treasury hereinbefore referred to are also appended to this petition.

No assignment or transfer of said claims or any part thereof or interest therein has been made, and the said County of Logan, and

your petitioners, the sinking fund commissioner of said county representing said county, are the owners and entitled to the full amount of said sum of $15,397.75 from the United States after allowing all just credits and offsets.

Your petitioners have demanded that the amount so certified and allowed be paid in due course of office; but there has been paid only the sum of nine thousand five hundred and thirty-three dollars and fifty-four cents, and all other or further payments have been refused. There is still due on the amount allowed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, the sum of five thousand eight hundred and sixty-four dollars and twenty-one cents ($5,864.21), for which payment has been refused, though often requested. Petitioners therefore demand judgment against the United States for said sum of five thousand eight hundred and sixty-four dollars and twenty-one cents.

FONTAINE T. FOX,
Attorney for Board of Sinking Fund Commissioners of Logan County, Ky.

THE STATE OF KENTUCKY, }
Logan County. }

Thos. B. Harrison, chairman of the special board of sinking fund commissioners of Logan county, being duly sworn, on oath says that no assignment or transfer of the claim mentioned and set forth in the foregoing petition or any part thereof or any interest therein has been made; that the petitioners are justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets and he believes the facts stated in said petition are true.

THOS. B. HARRISON,
Chairman of Special Board of S. F. Com'rs of Logan Co., Ky.

Subscribed and sworn to before me this 5th day of March, A. D. 1894.

J. CAP. MORTON,
[SEAL.] *Notary Public, Logan Co., Ky.*

My commission expires July 15, 1894.

5 (Copy.)

E. H. B. Enclosure. S. N.
C. H. I.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
WASHINGTON, D. C., *September* 28, 1893.

Hon. J. G. Carlisle, Secretary of the Treasury.

SIR: I have the honor to transmit herewith for your consideration, advisement, and approval, the claim of Logan County and of the sinking fund commissioners of Logan county, Kentucky, for the refunding of seventeen thousand six hundred and six dollars and

fourteen cents ($17,606.14), tax alleged to be due and payable to the said county, under the provisions of the act of Congress (public, No. 91) approved February 25, 1893, entitled "An act for the benefit of the State of Kentucky, Logan and Simpson counties, and of Louisville, Kentucky, &c."

Among other things the act directs the refunding to Logan County, and the board of sinking fund commissioners of said county of "internal-revenue taxes collected on railroad dividends, on stock owned by said * * * county * * * in the Louisville and Nashville Railroad Company * * * to the extent that such taxes were deducted from any dividends * * * due and payable to the said board * * * and which have not been heretofore refunded."

The tax claim was collected on the dividends and the surplus afterwards converted into dividends on stocks of the Louisville and Nashville Railroad Company held by Logan County, Kentucky, between October 1, 1862, and July 5, 1872. The total amount withheld from said county on account of tax on dividend on stock is found to be nine thousand five hundred and thirty-three dollars and fifty-four cents ($9,533.54) and the total share of taxes on surplus borne by said county, is found to be five thousand eight hundred and sixty-four dollars and twenty-one cents ($5,864.21), making an aggregate of fifteen thousand three hundred and ninety-seven dollars and seventy-five cents ($15,397.75).

I propose to allow the claim for this amount.

Respectfully yours,

(Signed) G. W. WILSON,
Acting Commissioner.

(Copy.)

9494A.
28–EK.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *October* 6, 1893.

To the Commissioner of Internal Revenue.

SIR: With your letter of the 28th ultimo you submitted "for the consideration, advisement, and approval of the Secretary, the claim of Logan County and the sinking fund commissioners of Logan county, Kentucky, for the refunding, under section 3220 R. S., of $17,606.14 internal-revenue tax alleged to be due and payable to the said county under the provisions of the act of February
6 25, 1893 (27 Stat., 477), directing the refunding to said county of "internal revenue taxes collected on railroad dividends on stock owned by said * * * county and the board of sinking fund commissioners of said county, * * * in the Louisville and Nashville Railroad Company * * * to the extent that such taxes were deducted from any dividends * * * due and payable to said board * * * and which have not been heretofore refunded."

You find that the sum of $15,397.75 was withheld by said Louisville and Nashville railroad as follows: $9,533.54 on account of tax on dividends on stocks of said railroad company held by Logan County, and $5,864.21 on account of tax on the surplus afterwards converted into dividends on stocks in said company held by said county.

Your allowance is hereby approved, and the claim is herewith returned.

Respectfully yours,
(Signed) C. S. HAMLIN,
Acting Secretary.

L. J. C.

E. H. B. R. T. H.

No. 1403.

A Schedule of Claims for the Refunding of Taxes which have been Examined and Allowed.

Dist.	Claimants.	Amount.
5th Ky.	Sinking fund commissioners of the city of Louisville, Kentucky	$31,359 02
	Sinking fund commissioners of Logan county, Kentucky	15,397 75
	Sinking fund commissioners of Simpson county, Kentucky	1,296 02
	Total	$48,052 79

I hereby certify that the foregoing claims for refunding of taxes erroneously assessed and paid have been examined and allowed.

G. W. WILSON,
Acting Commissioner of Internal Revenue.

Office of Internal Revenue, October 7, 1893.

7 II.—*Amendment to Petition. Filed by Leave of Court April 1, 1895.*

To the honorable judges of said court:

Your petitioners, by leave of the court first had and obtained, file this their amendment to their original petition, as follows:

At the end of said petition add the following additional count or paragraph:

2d. Your petitioners further say that in their application to the Commissioner of Internal Revenue for the refunding of the sum of

$15,397.75, mentioned in the first count or paragraph of their petition, and to which petition reference is here made, they made demand for interest upon the amount so illegally collected from them, which said claim for interest was disallowed, and they aver that there is justly due and owing to them interest upon the aforesaid sum of fifteen thousand three hundred and ninety-seven and $\frac{75}{100}$ dollars, at the rate of six per cent., from the 6th day of July, 1872. No assignment or transfer of said claim or any part thereof or interest therein has been made, and the said County of Logan and your petitioners, the Sinking Fund Commissioners, representing said county, are the owners, and entitled to the full amount of said claim for interest, and they therefore demand judgment for the amount of said interest from the date last aforesaid.

FONTAINE T. FOX,
Attorney for Claimants.

THE STATE OF KENTUCKY, }
County of Logan, } *ss:*

Thos. B. Harrison, chairman of the special board of sinking fund commissioners of Logan county, being duly sworn, on oath says that no assignment or transfer of the claim mentioned and set forth in the foregoing amendment to the petition or any part thereof or any interest therein has been made; that the petitioners are justly entitled to the amount therein claimed from the United States after allowing all *past* credits and offsets, and he believes the facts stated in said amendment to said petition are true.

THOS. B. HARRISON,
[SEAL.] *Chairman Special Board of Sinking Fund Commissioners of Logan County.*

Subscribed and sworn to before me this 26th day of March, 1895, by Thos. B. Harrison, chairman aforesaid.

M. B. MORTON,
Clerk of Logan County Court.

8 III.—*Traverse. Filed November* 12, 1895.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney General.

9 IV.—*Findings of Fact and Conclusion of Law. Filed December 2, 1895.*

Findings of fact.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

Between October 1, 1862, and July 6, 1872, the County of Logan, Ky., owned some of the stock of the Louisville and Nashville Railroad Company, upon which stock the company paid cash dividends from time to time, retaining, however, in each of the years 1865 to 1871, inclusive, an undistributed surplus. Under the internal-revenue laws in force during that period the company paid taxes to the United States upon its dividends and upon its surplus earnings, the taxes on the former being deducted from the amount which would otherwise have been paid in full to the stockholders, but such deduction was not known to the sinking fund commissioners of the county until the time had expired for an application for a refund of the taxes so deducted.

The following is one of the returns made by the railroad company, and all were in substantially the same form:

Capital.	Net gains since prior dividend.	Rate of dividend declared.	Amount of dividend declared.	95 per cent. of dividend, being the whole amount paid to stockholders, etc.	5 per cent. of dividend retained as excise tax.
$5,527,870 63	$1,718,068 01	4 per cent. and tax.	$232,752 44	$221,114 82	$11,637 62
Profits over dividend declared, $1,485,315.57, 5 per cent. of which is..					74,265 78

II.

On November 16, 1867, the directors of the said company resolved to make an increase of its capital stock to the extent of 40 per cent., the same to be distributed among the owners of stock in proportion to the amounts owned by them on a certain date, by certificates of stock to be issued therefor after February 10, 1868. The County of Logan received in 1868 certificates for its due proportion of said increase of stock.

10 The following is the resolution by virtue of which the stock dividend was declared and distributed:

1867, Nov. 16. Resolved, that an increase of the stock of forty per cent. be made, the same to be distributed among the owners of stock in proportion to the amounts owed by them at the next closing of the books for the transfer of stock, by certificates of stock to be issued by the company for whole and fractional shares as the same may be due to each, and to be issued after the 10th of February, 1868, and whenever the net annual earnings of the company shall be sufficient to pay the interest accruing upon the indebtedness of the company, provide a sinking fund sufficient to pay the bonded debt of the company as it falls due and to pay 6 per cent. on the stock so increased by said 40 per cent. and upon 10 per cent. additional stock, there shall be a further increase of stock of 10 per cent., to be distributed as aforesaid, and in like manner there shall be additional distributions of stock at the rate of 10 per cent. from time to time as the net annual earnings of the company shall be sufficient to pay the interest on the indebtedness of the company, provide a sinking fund as aforesaid, and six per cent. on the stock so increased until the stock shall amount to ten million of dollars, and such increase of stock from time to time as aforesaid shall be charged on the books of the company to profit and loss account.

At the time when the stock dividend was declared, November 16, 1867, the nominal or par value of the capital stock of the Louisville and Nashville Railroad Company was $5,638,600.

The surplus earnings of the road, reported by the officers thereof to the Internal Revenue Department, prior to the year 1868, on which the road paid a tax of five per cent.—

Amounted in the aggregate to.....	$2,461,787 17
Tax paid thereon	123,089 36
	$2,338,697 81

The par value of the stock dividend in 1867 was $2,131,500.00.

III.

Under the act of February 25, 1893 (27 Stat. L., 477), the County of Logan presented a claim to the Commissioner of Internal Revenue for a refund of $17,606.14, which amount was made up as follows:

Tax on cash dividends.....	$9,645 47
Tax on surplus prior to 1868.....	6,747 89
Tax on surplus, 1868 and subsequently.....	1,212 78
Total.....	17,606 14

It appearing that the county had sold, May 3, 1879, all its stock in the Louisville and Nashville Railroad Company, the claim for taxes on surplus profits in 1868, and thereafter was subsequently withdrawn.

IV.

The Commissioner of Internal Revenue, on the 28th day of September, 1893, addressed a letter to the Secretary of the Treasury recommending the allowance of said sum, and asking his approval. On the 6th day of October, 1893, the Secretary of the Treasury approved this action and recommendation of the Commissioner, and on the 7th day of October, 1893, it was formerly scheduled and allowed by the Commissioner of Internal Revenue, of which notice was given to the proper officers of the Treasury Department. The schedule so made out and the papers in the case were referred to the Fifth Auditor of the Treasury and passed and approved by him. They then went before the Comptroller, and he refused to issue a warrant for the amount or direct the payment of the same, holding that the allowance of the claim for taxes paid on account of stock dividends was illegal and unauthorized. He thereupon directed the payment of $9,533.54, and refused to pay any other or further sum. This suit is brought to recover the sum of $5,864.21, which was rejected by the Comptroller and which he refuses to pay.

The letter of the Commissioner of Internal Revenue and the approval of the Secretary of the Treasury are those annexed to and forming part of the petition in this case.

11

V.

Prior to the passage of the act 25th February, 1893, the following proceedings had taken place in the Treasury Department relative to the same taxes paid by the same company:

During the period from October 1, 1862, to July 6, 1872, the city of Louisville, Ky., was the owner of a large amount of the stock and bonds of the Louisville and Nashville Railroad Company. Cash dividends were declared upon this stock. There was also a large amount of undistributed surplus belonging to the city, upon which stock or scrip dividends were issued to the city. These cash dividends and the undistributed surplus which was converted into stock or scrip dividends were held by the officers of the government to be subject to taxation, and taxes were assessed and collected according to the terms of the statute in force at the time of the respective collections. The taxes were paid by the railroad company, and the amounts so paid were deducted by the company from the sums due and payable to the city of Louisville—that is to say, before paying over dividends, the taxes were taken out, and the city received the dividends diminished by the amount of the taxes so paid, and its revenues were lessened to that extent.

On the 25th day of September, 1890, the sinking fund commissioners of the city of Louisville made application, under the act 16th June, 1890, for the refunding of taxes in the following amounts:

For tax on gross receipts	$18,240 59
For tax on cash dividends	24,801 14
For tax on undistributed surplus or stock dividends	21,721 29
For interest	815 30

On these claims the Commissioner of Internal Revenue allowed the following refund, which was approved by the Secretary of the Treasury:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
WASHINGTON, D. C., *January* 24, 1891.

Hon. William Windom, Secretary of the Treasury.

SIR: I have the honor to submit herewith for your consideration and advisement the claim of the sinking fund commissioners of the city of Louisville, in the State of Kentucky, for the refunding of taxes collected from the Louisville and Nashville Railroad Company to the amount of $65,578.32.

The taxes were collected prior to 1873, and the claim was filed in September, 1890.

The claim is therefore barred, except so far as the act of June 16, 1890 (public, No. 157), authorizes the adjustment of it. That act directs the adjustment of this claim "to the extent that such taxes were deducted from any dividends due and payable," and does not direct the adjustment of the claim to the extent that taxes were deducted from interest or gross receipts.

I have, therefore, only to consider the amount deducted from dividends accruing to the city of Louisville by virtue of its shares of stock in the railroad company.

The tax on dividends was paid by the railroad company under the provisions of section 122 of the act of June 30, 1864.

So far as this tax was deducted from dividends accruing to the city of Louisville it was unlawfully deducted and paid over to the United States. (See decision of the U. S. Supreme Court in the case of United States *v.* Railroad Company, 17 Wall., 322.)

The amount so deducted from the share of dividends to which the city of Louisville was entitled is found to be $42,514.03, which embraces the sum of $24,801.14 collected on cash dividends and $17,712.89 collected as tax on surplus profits, which were afterward set apart by resolution of the board of directors of the railroad company as the basis of a stock dividend which was declared in 1868.

I propose to allow the claim for the sum of $42,514.03.

Respectfully yours, JOHN W. MASON,
Commissioner.

On the 14th day of February, 1891, the claims so allowed were submitted to Congress by the following correspondence:

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *February* 14, 1891.

SIR: Referring to an act for the relief of the board of commissioners of the sinking fund of the city of Louisville, Ky., approved June 16, 1890 (26 Stat., p. 157), which directed the audit and adjustment of the claim of said board of commissioners for internal-revenue taxes, etc., I have the honor to inclose copy

of a report made by the First Comptroller in the case, of this date, showing that the sum of $42,514.03 is found due the claimants.

As there is no appropriation available for the payment of the claim, the sum found due as shown by the comptroller's letter is respectfully submitted for the action of Congress.

Respectfully yours, A. B. NETTLETON,
Acting Secretary.

The Speaker of the House of Representatives.

TREASURY DEPARTMENT,
FIRST COMPTROLLER'S OFFICE,
WASHINGTON, *February* 14, 1891.

SIR: The letter of Senator Blackburn, in regard to the claim of the sinking fund commissioners of the city of Louisville, Ky., is respectfully returned with the remark that the act for the relief of the claimant was passed by the Fifty-first Congress at the first session, on the 16th of June, 1890. It directed the Secretary of the Treasury and the Commissioner of Internal Revenue to audit and adjust the claim, which they have done, finding the amount of $42,514.03 due the claimant, the correctness of which finding is not questioned by this office. In due course, on the 4th instant, this claim, so adjusted, reached this office for payment. The act requiring the audit and adjustment does not carry an appropriation for the payment of the amount to the claimant, nor can it be paid out of the permanent annual appropriation, under section 3689, Revised Statutes.

As the present Congress has had this matter under consideration, and referred it for adjustment, I see no impropriety in reporting it at once for an appropriation.

Very respectfully, A. C. MATTHEWS,
Comptroller.

Hon. A. B. Nettleton, acting Secretary of the Treasury.

Under the provision of the deficiency appropriation act, 30th June, 1891 (26 Stat. L., p. 867), "For payment to the city of Louisville, Kentucky, the amount found due under the act of Congress approved June 16, 1890, and reported to Congress in House Executive Document No. 260 of the present session, $42,514.03," the money was paid to the city by the proper officers of the Treasury Department.

Conclusion of Law.

And upon the foregoing findings of fact the court decides as a conclusion of law:

The petition of the claimants should be dismissed.

V.—*Opinion of the Court.*

NOTT, J., delivered the opinion of the court:

Between October 1, 1862, and November 16, 1867, the Louisville and Nashville Railroad Company made certain returns to the Commissioner of Internal Revenue under the act 30th June, 1864 (13 Stat. L., p. 223), showing the dividends declared and "profits over dividend declared" which had been made by the company. The following is one of these returns:

Capital.	Net gains since prior dividend.	Rate of dividend declared.	Amount of dividend declared.	95 per cent. of dividend, being the whole amount paid to stockholders, etc.	5 per cent. of dividend retained as excise tax.
$5,527,870 63	$1,718,068 01	4 per cent. and tax.	$232,752 44	$221,114 82	$11,637 62
Profits over dividend declared, $1,485,315.57, 5 per cent. of which is..					$74,265 78

13 The tax withheld by the company on the "dividends declared" has been refunded to the claimant under the following statute, and is not now a subject of controversy:

CHAP. 165.

An act for the benefit of the State of Kentucky, Logan and Simpson counties and of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, be, and he is hereby authorized and required to audit and adjust the claims of the sinking fund commissioners of the State of Kentucky, of Logan and Simpson counties in said State, of the city of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee, for internal-revenue taxes collected on railroad dividends on stock and on interest on railroad bonds owned by said counties, and city, respectively, in the Louisville and Nashville Railroad Company and of said State for internal-revenue taxes collected, and interest on railroad bonds of the railroad from Louisville to Lexington and on dividends on stock of said railroads owned by said State, and due and payable to said boards of sinking fund commissioners, respectively, and to said State, counties and

city, to the extent that such taxes were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded, and for this purpose, any statute of limitations to the contrary notwithstanding, sections nine hundred and eighty-nine, thirty-two hundred and twenty, thirty-two hundred and twenty six, thirty-two hundred and twenty-seven, and thirty-two hundred and twenty-eight of the United States Revised Statutes are hereby made applicable and available with the force and effect as if protest and demand for payment had been made within the time prescribed by said sections; and the amounts, when ascertained as aforesaid, and not heretofore refunded shall be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year.

Approved February 25, 1893 (27 Stat. L., p. 477).

Under this act of 1893 an award was make by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, first, of the claimants' proportional part of the tax paid on cash dividends; second, of the claimants' proportional part in the profits over dividends upon which the company had paid a tax. The Comptroller of the Treasury allowed the former, and it has been paid and is no longer a subject of controversy; he rejected the latter, and it forms the subject, directly or indirectly, of the present suit.

An action will lie upon an award of the Commissioner of Internal Revenue, and it can be attacked only for fraud, mistake, or want of jurisdiction. The statute under which the Commissioner acted, this act of 1893, authorizes and requires him to audit and adjust the claim for "internal-revenue taxes collected on railroad dividends on stock, and on interest," "to the extent that such tax was deducted from any dividends or interest due and payable to such boards, respectively." The question then is, was the Commissioner of Internal Revenue authorized to make this refund of a tax on moneys which were profits, but which were never distributed or paid over to the shareholders as dividends? Or, stated differently, were these taxes deducted "from any dividend or interest due and payable to such boards?"

The distribution upon which the Commissioner of Internal Revenue acted, and which is now relied upon to uphold his action, was a stock dividend ordered by the directors of the company November 16th, 1867: "Resolved that an increase of the stock of forty per cent. be made, the same to be distributed among the owners of stock in proportion to the amounts owned by them at the next closing of the books for the transfer of stock, by certificates
14 of stock to be issued by the company for whole and fractional shares, as the same may be due to each," etc. No deduction of the tax from the scrip dividends of the claimant was ever made in terms. If there was a deduction, it is merely inferable from these facts: (1) That a payment of the tax diminished the amount of the profits of the company; (2) that a stock dividend may be assumed to represent profits not distributed in dividends; (3) that the claimant would have received more stock if the profits had not been diminished by the payment of a tax from which a municipal corpo-

ration was exempt, it being, under the decision of the Supreme Court in the case of The United States *v.* Baltimore and Ohio Railroad (17 Wall. R., 322), "a portion of the sovereign power of a State."

Here it should be premised that the act of 1893 is simply remedial. It does not create a claim or declare a right. All that it does, or assumes to do, is to relieve the claim from the bar of a statute of limitations. It does not empower the Commissioner to refund money which he could not have refunded if the claimant had applied to him in due time and the act of 1893 had never been passed. The exemption of the claimant and the right to a refund must be determined by the act of 1864, under authority of which the tax was imposed and, legally or illegally, collected.

The act of 1864 provides (§ 122) that "any railroad" that may declare "any dividend in scrip, or money due or payable to its stockholders, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a duty of five per centum on the amount of all such interest, or coupons, dividends, or profits, whenever the same shall be payable; and said companies are hereby authorized to deduct and withhold from all payments, on account of any interest, or coupons and dividends due and payable as aforesaid, the duty of five per centum." The act of 1893 uses substantially the same language—"taxes deducted from any dividends or interest due and payable"—and manifestly refers to the same thing. That is to say, the thing referred to by the act of 1893 is the tax deducted and withheld from a dividend due and payable as prescribed and authorized by the act of 1864. What right, then, had the claimant under the act of 1864 to a refund of the five per cent. tax paid on profits which were not distributed as dividends, but retained by the company for its own corporate purposes?

The law of corporations knows no owner of corporate property save the company. No individual or body, corporate or political, can, as a shareholder, set up a personal immunity or privilege and say that it holds stock in a company on other terms and conditions than other shareholders, and ask recognition in law for its exceptional property rights. When a man or a community or a body politic voluntarily enters a corporation and becomes a stockholder he gains the advantage of non-personal liability, and in consideration thereof surrenders control and ownership of the money which he so invests. It is no longer his; it has become the property of the corporation. How the corporation may use it or what it may pay him back is his concern, or a question between him and it. The rest of the world knows him not as a fractional part of the corporate whole, and deals only with the legal entity of the corporate body. To undistributed, unapportioned money which is not his and which is the corporation's he can assert no right—constitutional, legal, or natural.

15 The act of 1864 (§§ 120, 122) recognized this principle of corporations. The purpose of the statute was to impose a tax on all dividends derived from all corporate bodies in the United

States, whether the stock was owned by men, women or children, by citizens or aliens, by residents or non-residents; and the policy of the act was to make the corporate bodies collect and pay over the tax. When a dividend was declared, the money which had been the corporation's became the several shareholders', and the company, *eo instanti*, became the agent or instrumentality of the Government to collect the tax.

Did the money, termed "profits over dividends declared" in the tax return and "profits of such companies carried to the account of any funds or used for construction" in the statute, ever pass to the individual shareholders and become their property, subject to their personal liabilities on the one hand, and entitled to their personal immunities on the other? It remained in the hands of the company and was applied to its business purposes—to improving, increasing, and augmenting the corporate property. It might have been distributed as dividends, but was not. Equitably and morally it may have been the property of the shareholders, and they might have been entitled to receive it, but they elected through their representatives, the directors, to reinvest it in an enlargement of their corporate property, and the reinvestment was as much their act as if they had voluntarily, each and all, paid in the money. In time they elected to issue to themselves evidences of their augmented capital, and these evidences came in the form of stock dividends. In bodies corporate, as in bodies politic, the majority rules, and rules through representatives, and the acts of the majority are the acts of all. If originally the shareholders in this railroad company had elected not to enlarge their business and increase their capital, but to distribute among themselves all of the profits which the company had made, some of them would have received their dividends after the payment of the tax, and some would have received it, or would have been entitled to receive it, without the deduction of the tax; but the latter cannot now say that they should recover a proportional part of a corporate tax for the reason that it was imposed upon profits, and that if their share of such profits had been paid over to them they would not have been liable to pay a tax upon it. The distinction between the two cases of dividends and profits is this, that in the one the shareholder was the owner of the money and was then illegally taxed upon it; in the other, the shareholder was not the owner of the money and the tax imposed upon it was legally imposed and properly paid by the company.

The committees of Congress that reported and recommended the passage of the bill have said in their reports that the only question before them was, "Whether the municipalities named in this bill should be relieved from the bar of the statutes of limitations;" and the ground of the appeal to Congress was that these municipalities were ignorant of the fact that a tax had been deducted from their dividends, and of the law as subsequently declared by the Supreme Court in United States *v.* Railroad Company (17 Wallace, 322). But if the municipalities had known of the payment of the tax on these reserved profits or "undistributed sums," and of the law as

16 subsequently declared by the Supreme Court, of what would it availed them? They could not have asked for a refund at the time when the tax was paid, because the profits had not been turned into a dividend by the company, but had been retained by a corporate body for corporate purposes. They could not have asked for a refund in 1867, when the stock dividend was issued, because more than two years had elapsed since the payment of the tax, and no tax was then paid on the scrip dividend. Furthermore, had there been no statute of limitations the Commissioner of Internal Revenue could not in 1865 or in 1867 have made a refund, for the money was legally collected when the tax was paid, and the tax could not have been invalidated, in whole or in part, by an act of the company done long after the collection. Neither could the Commissioner have held that the distribution of a stock dividend in 1867 was in legal effect the distribution of a cash dividend in 1865. If these municipalities, by reason of their exemption from Federal taxation, are entitled to a refund of their proportional part of this corporate tax merely because the money might have been distributed in dividends when it was not, they are entitled to a refund of their proportional part of every Federal tax which was paid by the company; for every tax was paid out of profits, and lessened profits, and to that extent diminished the dividends which the municipalities might have received.

A natural person holding stock in a corporation cannot say on one day, "I am only a stockholder and am exempt from personal responsibility for the corporate acts of the company," and on another day, "I am part owner of the corporate property, and entitled to have my proportional part recognized and treated as if it were my specific property." Bodies politic stand upon no different footing when they buy and sell in the marts of commerce or become investors in corporate property. They cannot say on one day, "We have assumed no liability on behalf of this company save such as is common to our fellow-shareholders," and on another day, "Our immunity from taxation demands that our proportional part of the corporate property be exempt from taxation also; and if it be ascertained and segregated and set over to us at any time by the act of the corporation, we can retroactively go back and demand a refund of our proportional part of a tax which was paid when our proportional part of the thing taxed was the property of the corporation." The crucial question in this case is, Who was the owner of the property when the tax was collected? and the controlling fact in the case is that the undistributed profits of the company were not the property of the claimant when the tax on them was paid. It was not the claimants' property that was taxed; and there is no law which authorizes a refund to one person of a tax imposed on another person's property, or which authorizes the refund of a tax which was legally imposed and collectible when it was paid.

The judgment of the court is that the petition of the claimants be dismissed.

17 VI.—*Judgment of the Court.*

At a Court of Claims held in the city of Washington on the second day of December, A. D. 1895, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimants, The Commissioners of the Sinking Fund of Logan County and The County of Logan, Kentucky, be dismissed.

BY THE COURT.

18 VII.—*Application for and Allowance of Appeal.*

THE COMMISSIONERS OF THE SINKING FUND OF LOGAN COUNTY and THE COUNTY OF LOGAN, KENTUCKY, *vs.* THE UNITED STATES. } 18316.

From the judgment rendered in the above-entitled case on the second day of December, 1895, by which the petition was dismissed, the claimants, by their attorney, on the 28th day of February, 1896, make application for and give notice of an appeal to the Supreme Court of the United States.

FONTAINE T. FOX,
Attorney for Claimants.

Filed February 28, 1896.

Allowed in open court April 8, 1896.

WILLIAM A. RICHARDSON,
Chief Justice.

19 In the Court of Claims.

THE COMMISSIONERS OF THE SINKING FUND OF LOGAN COUNTY and THE COUNTY OF LOGAN, KENTUCKY, *vs.* THE UNITED STATES. } No. 18316.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court of the judgment of the court dismissing the petition, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this first day of May, A. D. 1896.

Seal Court of Claims.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Case No. 16,274. Court of Claims. Term No., 167. The Commissioners of the Sinking Fund of Logan County and The County of Logan, Kentucky, appellants, *vs.* The United States. Filed May 1, 1896.